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11 Attorneys for Christina W. Lovato, Chapter 7 Trustee

12 **UNITED STATES BANKRUPTCY COURT**
 13 **DISTRICT OF NEVADA**

14 In re
 15 DOUBLE JUMP, INC.
 16 Debtor.

Lead Case No.: BK-19-50102-gs
 (Chapter 7)
 Substantively Consolidated with:

19-50130-gs	DC Solar Solutions, Inc.
19-50131-gs	DC Solar Distribution, Inc.
19-50135-gs	DC Solar Freedom, Inc.

20 CHRISTINA W. LOVATO,
 21 Plaintiff,
 22 v.
 23 AHERN RENTALS, INC. and XTREME
 MANUFACTURING, LLC,
 24 Defendants.

Adversary No.: 22-05001-gs

**TRUSTEE'S REPLY IN SUPPORT OF
 TRUSTEE'S MOTION FOR
 PROTECTIVE ORDER [ECF No. 81] AND
 IN RESPONSE TO DEFENDANTS'
 RESPONSE [ECF No. 87]**

Hearing: June 29, 2023
 Time: 9:30 a.m.

1 Christina Lovato, the trustee (“*Trustee*”) for the chapter 7 estates of DC Solar Solutions,
 2 Inc., DC Solar Distribution, Inc., DC Solar Freedom, Inc., and Double Jump, Inc. (together, “*DC*
 3 *Solar*”) files her reply in support of her motion to for protective order [ECF No. 81] (“*Motion*”)
 4 and in response to Defendants’ response [ECF No. 87]. In support, the Trustee states as follows.

5 **I. Introduction**

6 The Trustee will sit for a R. 30(b)(1) deposition. However, the Defendants have no right to
 7 a R. 30(b)(6) deposition of the Trustee, especially in these circumstances, and even more especially
 8 given the overbroad and excessive Topics.

- 9 • The Trustee is not subject to a R. 30(b)(6) deposition per the Rule’s plain language.
- 10 • The Trustee did not gain the benefit of the corporate form and should not have to sit for a
 11 R. 30(b)(6) deposition which is an accompanying burden to that benefit.
- 12 • R. 30(b)(6) is not designed to be a memory contest, which is all the Defendants will get
 13 from such a deposition.
- 14 • The Defendants have taken zero other depositions in this Adversary and should not be
 15 permitted to place the entire burden on the Trustee.
- 16 • The Topics are overly broad, excessive, disproportional, not reasonably calculated to
 17 achieve the R. 30(b)(6) goals, and should be stricken in any event.
 - 18 ○ The Trustee appreciates the Defendants’ willingness to further confer on the
 19 Topics, which the Trustee addresses below.

20 The Defendants state that the Trustee’s position is that “the Defendants’ sole source of
 21 information should be the DC Solar former employees, many of whom are behind bars ...”.
 22 Response, pg. 2:23-24. This is inaccurate.

- 23 • The Defendants can depose the Trustee under R. 30(b)(1).
- 24 • The Defendants have the detailed Plea Agreements and the Davis Report,¹ which the
 25 Trustee intends to utilize in connection with the Ponzi Presumptions of “actual intent” and
 “insolvency,” and which includes a financial reconstruction and identifies the documents
 26 Ms. Davis considered in support.
- 27 • The Defendants have asked for and been provided with a significant number of documents
 28 after “search terms” were agreed-upon, as well as other documentary discovery. The

¹“*Davis Report*” means the expert report of Melissa Davis, CPA, CFE, CIRA [ECF No. 17].

1 Defendants have served other written discovery on the Trustee which the Trustee has
 2 responded to. The Defendants can serve other written discovery.

- 3
- 4 The Defendants have access to (1) the incarcerated individuals for deposition, equal to the
 5 Trustee, and (2) their own employees, better than the Trustee; and (3) other third parties,
 6 equal to the Trustee.

7 The Trustee has taken six depositions in this Adversary and intends to take a few more.
 8 The Defendants, on the other hand, have taken zero depositions. The Defendants cannot place the
 9 entire burden-of-memorization on the Trustee, an after-the-fact fiduciary who was not “there” at
 10 the time.

11 **II. The Plain Language of Rule 30(b)(6) and the *Montreal* Decision**

12 The plain language of R. 30(b)(6) does not allow for the deposition of the Trustee – an
 13 individual. The Defendants rely on *In re Montreal Maine & Atl. Ry., Ltd.*, 608 B.R. 1 (Bankr. D.
 14 Me. 2019), which is distinguishable, and respectfully and in part, wrongly decided.

15 First, R. 30(b)(6) is clear that it applies only to an “entity” or “organization” - the Trustee
 16 is neither. Respectfully, *Montreal*’s analysis does not adequately address the Trustee’s argument
 17 that: (1) the Rule must be interpreted by its plain language; and (2) rules of interpretation arising
 18 from the differing language contained in R. 30(b)(6) & 30(a)(1). Motion, pg. 4.

19 Second, *Montreal* dealt with a post confirmation chapter 11 trustee of an estate where the
 20 “Plan and Confirmation Order” provided that the trustee “was appointed the sole officer and
 21 director of MMA to serve in accordance with MMA’s certificate of incorporation and bylaws ...”.
 22 That is a very different situation. Here, the Trustee did not contractually accept her role as an
 23 officer and director per any corporate bylaws. The Trustee is a chapter 7 trustee, her duties are
 24 governed by Section 704 of the Code, and she is neither an “entity” nor an “organization” within
 25 the plain language of R. 30(b)(6).

26 Third, the Defendants did not notice the “chapter 7 estate” as a R. 30(b)(6) deponent in
 27 their Notice (only the Trustee) and may not change their court papers through briefing.

28 **III. *Koken v. Lederman*, 2001 WL 34368781, *1 (E.D. Pa. Oct. 25, 2001)**

29 The Defendants ignore many of the Trustee’s arguments, but the Trustee raises again
 30 *Koken v. Lederman*, 2001 WL 34368781 (E.D. Pa. Oct. 25, 2001) – not even cited in the

1 Defendants' response – briefly. There, the plaintiff was an individual suing in his capacity as the
 2 liquidator of a defunct insurance company (equivalent to a bankruptcy trustee²) and the defendants
 3 sought his Rule 30(b)(6) deposition. The district court held:

4 **In the circumstances of this litigation**, in which the plaintiff is a public official
 5 acting in her capacity as liquidator of a defunct insurance company, and in which
 6 the plaintiff and her subordinates have no firsthand knowledge of the affairs of the
 7 defunct insurance company, the use of Rule 30(b)(6) depositions is inappropriate.
 8 Persons designated pursuant to that rule, having no firsthand knowledge, would
 9 need to be prepared in advance for such depositions, with the result that the
 10 depositions would inevitably invade the work-product privilege. The preferable
 11 course, in my view, is to employ contention interrogatories.
 12 (emphasis added).

13 The same reasoning and conclusion is appropriate here, and there is “good cause” for the issuance
 14 of a protective order. “[T]he circumstances of **this litigation**” include as follows:

- 15 • The Trustee will sit for a R. 30(b)(1) deposition and can answer questions from her
 16 personal knowledge.
 17 • The Defendants can serve contention interrogatories, including on the Topics.
 18 • The Defendants can depose others, who were “there.”
 19 • The Defendants can read the Plea Agreements.
 20 • The Defendants can read the Davis Report.
 21 • The Defendants can speak with their own clients and their own employees, and
 22 others in informal or formal discovery.
 23 • The deposition – especially when examining the Topics – will necessarily invade
 24 the Trustee’s and her professionals’ protected work product and privilege.
 25 • A R. 30(b)(6) would be a tremendous burden on the Trustee.

26 **IV. This is a Straightforward Action**

27 The Trustee has brought avoidance claims – not tort claims. The Trustee’s elements of her
 28 case-in-chief are straightforward and mandated by statute (like the Defendants’ defenses). Indeed,
 29 the Trustee has already provided the Defendants with the Davis Report, her theory of the case, and
 30 her intention to use the Ponzi Presumptions of insolvency and actual intent at summary judgment
 31 (and if necessary, at trial) to prove the applicable statutory requirements.³

26 ² See generally *F.D.I.C. v. O’Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995).

27 ³ The Trustee notes that she does not need to prove “in furtherance of,” but only “related” or
 28 “connected” to the Ponzi scheme, to be entitled to the Ponzi Presumption of Actual Intent. See
 e.g., *Goldsmith v. Zazzali as Trustee*, 814 F. App’x 279, 280 (9th Cir. 2020) affirming 2019 WL

1 On the other hand, the Defendants have the burden to prove their value and good faith
 2 defenses under 11 U.S.C. § 548(c). While the Trustee's Complaint included allegations based on
 3 a pre-suit investigation into the facts, the burden of these defenses (value and good faith) is on the
 4 Defendants. That certain items were included in the Complaint to provide context for the suit does
 5 nothing to show the appropriateness of a R. 30(b)(6) deposition.

6 **V. The Trustee Gained None of the Benefits Which Balance the Appropriateness of**
the Well-Established Burdens of a R. 30(b)(6) Deposition

7 In the Motion, the Trustee explained the well-established burdens of a R. 30(b)(6) and that
 8 they are appropriate because of the need to balance against the benefits an entity by operating
 9 through a corporate / entity shield. The Trustee did not obtain those benefits and should not suffer
 10 those burdens. Motion, pg. 4-6.

11 This is especially true where the Trustee:

- 12
- 13 • Will sit for a 30(b)(1) deposition.
 - 14 • Has answered and will answer written discovery.
 - 15 • Has turned over large amounts of documents and information.
 - 16 • The Plea Agreements are before the Court and in the Defendants' possession.
 - 17 • The Davis Report was filed with the Court.
 - 18 • The Trustee was not "there" at the time.
 - 19 • The clear invasion into work product and privilege.

20 There simply is no reason to subject the Trustee to the burden of a Rule 30(b)(6) deposition, and
 21 there is good cause for a protective order.

22 **VI. A Rule 30(b)(6) Deposition is Not a Memory Contest**

23 The Defendants repeatedly expand the Trustee's argument into a strawman and then seek
 24 to knock that strawman down. This is a logical fallacy⁴ and should be rejected.

25 13240380 (D. Idaho July 2, 2019); *In re Maui Indus. Loan & Fin. Co., Inc.*, 2013 WL 2897792,
 26 *7 (D. Haw. June 13, 2013); *Bash v. Textron Fin. Corp.*, 524 B.R. 745, 758 (N.D. Ohio 2015); *In*
re Agape World, Inc., 467 B.R. 556, 570 (Bankr. E.D.N.Y. 2012).

27 ⁴ <https://www.scribbr.com/fallacies/straw-man-fallacy/> ("Straw man fallacy is the distortion of
 28 someone else's argument to make it easier to attack or refute. Instead of addressing the actual
 argument of the opponent, one may present a somewhat similar but not equal argument. [] By
 placing it in the opponent's mouth and then attacking that version of the argument, one is
 essentially refuting an argument that is different from the one under discussion.").

1 **The Trustee will sit for a R. 30(b)(1) deposition.** The Trustee is not claiming a blanket
 2 privilege over everything she knows or has done. Rather, her position is that a R. 30(b)(6)
 3 deposition will inappropriately turn the deposition into a memory contest, be unduly burdensome,
 4 and necessarily invade work product and attorney client protections; thus, a protective order should
 5 issue. Motion, pg. 6-9.

6 A R. 30(b)(6) deposition is not a memory contest; it is simply impractical / impossible to
 7 expect the Trustee to be forced to know everything at a deposition, especially as an after-the-fact
 8 fiduciary with a number of professionals assisting her and the estate. Motion, pg. 12-13.

9 **VII. The Topics Are Overbroad and Excessive**

10 The Defendants cite to *Reno v. W. Cab Co.*, 2020 WL 5902318, *2 (D. Nev. Aug. 31,
 11 2020), which recites (citations and notations omitted, emphasis added) as follows:

12 A deposition taken pursuant to Rule 30(b)(6) requires a corporation to designate
 13 knowledgeable persons and to prepare them to fully and unevasively answer
 14 questions about the designated subject matter. **In light of the obligation on the**
noticed party, courts have recognized a reciprocal obligation by the party
seeking the deposition to carefully draft the deposition notice and have
repeatedly emphasized the practical constraints on the scope of a Rule 30(b)(6)
deposition. Courts have not hesitated to issue protective orders when
corporations are asked to respond to overly broad or unfocused Rule 30(b)(6)
deposition notices. ...

18 The purpose served by [Rule] 30(b)(6)—to require an organization to identify and
 19 designate a witness who is knowledgeable on the noticed topic, particularly where
 20 the noticing party is unable to itself identify an appropriate witness because that
 21 knowledge lies within the organization—**does not extend to burdening the**
responding party with production and preparation of a witness on every facet
of the litigation. This would render unworkable the obligation of the responding
 22 party to make a conscientious, good-faith effort to designate knowledgeable
 23 persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively
 24 answer questions about the subject matter, as that task becomes less realistic and
 25 increasingly impossible as the number and breadth of noticed subject areas expand.
To require the opposing party to respond to an excessive notice would be to
ignore the directive of Rule 26(b)(2)(C)(iii) to limit the extent of otherwise
relevant discovery where the benefit to and need of the propounding party is
outdone by the burden, expense, and ... impracticable demand imposed on the
other side.

28 **It is simply impractical to expect a Rule 30(b)(6) witness to know the intimate**
details of everything. Hence, while Rule 26(b)(1) permits a party to obtain

1 discovery regarding any nonprivileged matter that is relevant to any party's claim
 2 or defense, **courts have limited discovery where the breadth of subjects and**
 3 **number of topics identified in a Rule 30(b)(6) deposition notice renders a**
responding party's efforts to designate a knowledgeable person unworkable.

4 Even if R. 30(b)(6) deposition is permitted by the Court, the Defendants have failed to meet
 5 their obligations regarding the Topics. The Trustee relies on her Motion, pgs. 12-17, but responds
 6 to the Defendants' three bullet points (Response, pg. 10) as they demonstrate that the Trustee's
 7 correct position and the Defendants' incorrect position.

- 8 (1) Bullet Point 1 – It is true that the Defendants define “your” knowledge as the
 9 Trustee and her employees, agents, etc. **But this necessarily includes the**
Trustee’s lawyers and other professionals. In other words, the Topics specifically
 10 seek attorney client and work product matters. Not only is this improperly invasive
 11 on its face, but the Defendants should not be permitted to “depose” the Trustee’s
 12 lawyers and other professionals indirectly in this manner. Motion, pgs. 6-9.
- 13 (2) Bullet Point 2 – KMH Systems, Inc. and King Solarman, Inc. may be relevant,
 14 although only the former is mentioned in the Complaint. Moreover, the Defendants
 15 can take those parties’ depositions (and ask their own employees about them). The
 16 Trustee was not “there” and should not be burdened with a R. 30(b)(6) topic.
- 17 (3) Bullet Point 3 – The Trustee agrees that the Ponzi Presumption is relevant, but (1)
 18 disagrees with the Defendants’ statement of the law; (2) “relevancy” is not the
 19 standard for a R. 30(b)(6) deposition; and (3) the Davis Report provides more than
 20 enough information such that the proportionality of Defendants’ need simply does
 21 not favor a memory contest.

22 The Defendants mis-apply the standard. The Defendants, as the party seeking the R. 30(b)(6)
 23 deposition, have the burden “to carefully draft the deposition notice.” “Courts have not hesitated
 24 to issue protective orders when corporations are asked to respond to overly broad or unfocused
 25 Rule 30(b)(6) deposition notices.” *Reno*, 2020 WL 5902318, *2.

26 Here, the Topics are far too broad, unclear, and excessive, and place a tremendous and
 27 improper burden on the Trustee. As the Trustee explained in her Motion, citing to another court
 28 from within the Ninth Circuit, the Defendants have the burden to designate the R. 30(b)(6) topics
 with “**painstaking specificity**⁵ – here, the Defendants have failed their burden.

⁵ Motion, pg. 12-13 citing *United States v. HVI Cat Canyon, Inc.*, 2016 WL 11683593, *7 & *10 (C.D. Cal. Oct. 26, 2016) (emphasis added).

The Trustee appreciates the Defendants' willingness to confer on the Topics in the future, and the Trustee is of course willing to do so. The Trustee appreciates the Defendants' professionalism. But to be clear, the Topics show how burdensome and invasive (including into protected matters) a R. 30(b)(6) deposition of the Trustee would be and is, and that it should be denied completely under the circumstances of this litigation.

VIII. Conclusion

For all the reasons stated above, and in the Motion, the Trustee respectfully requests that Motion be granted. The Trustee will then work with the Defendants to arrange for and schedule the Trustee's R. 30(b)(1) deposition.

DATED: June 22, 2023.

HARTMAN & HARTMAN

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1 **CERTIFICATE OF SERVICE**

2 I certify that on June 22, 2023, I caused to be served the above-named document as
3 indicated below:

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Dated: June 22, 2023.

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